

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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VRINGO INC. and VRINGO
INFRASTRUCTURE, INC.,

Civ. Action No.
14-cv-4988 (LAK)

Plaintiffs,

-against-

ZTE CORPORATION and ZTE (USA) INC.,

Defendants.

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ZTE CORPORATION,

Civ. Action No.
15-cv-0986 (LAK)

Plaintiff,

-against-

VRINGO INC. and VRINGO
INFRASTRUCTURE, INC.,

Defendants.

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**MEMORANDUM OF LAW IN SUPPORT OF ZTE'S MOTION TO
MODIFY THE COURT'S JULY 24, 2015 ORDER**

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Introduction

On July 24, 2015, the Court entered an Order directing ZTE to make its General Counsel, Guo Xiaoming, available for a deposition in New York. Unfortunately, Mr. Guo is unwilling to travel to the U.S. because he risks detention or arrest at the border in connection with an unrelated criminal investigation.¹ ZTE therefore respectfully requests the Court to reconsider its decision and modify the Order to allow the deposition of Mr. Guo to take place outside the U.S.

Background

ZTE is under investigation by U.S. civil and criminal authorities for alleged export control violations in 2010. (Wysong Decl. ¶ 2.) There is a real risk that, in connection with this investigation, Mr. Guo will be detained or arrested at the border if he attempts to enter the U.S. (*Id.* ¶ 4.) Mr. Guo is unwilling to take this risk by traveling to the U.S.

To attempt to rectify the situation, ZTE has offered to pay all reasonable costs associated with conducting Mr. Guo's deposition in Hong Kong, including travel expenses for counsel and, if necessary, interpreters and a court reporter. To address the concern expressed in the Court's Order about resolving potential disputes, ZTE has also offered to pay the cost of having a special master appointed by the Court travel to Hong Kong to attend the deposition. ZTE is also willing to consider other locations for the deposition that would not pose the same risks for Mr. Guo and that might be more convenient for opposing counsel. Vringo has not agreed to these proposals.

Argument

ZTE finds itself between the proverbial rock and hard place. The Court is under no obligation to extricate ZTE from this location, but we respectfully ask the Court to do so as a matter of discretion and—for lack of a better word—mercy.

¹ ZTE's counsel, King & Spalding LLP, was not aware of Mr. Guo's unwillingness to travel to the U.S. at the time of the prior briefing on the motion to compel Mr. Guo's deposition.

Simply put, Mr. Guo will not come to the U.S. for a reason that has nothing to do with this case. This situation is similar—though certainly not identical—to cases involving medical hardship or other hardship affecting a witness's ability to travel. In such cases, other courts have permitted depositions to take place in other locations.² ZTE acknowledges, however, that other decisions in this District have directed parties to appear for depositions notwithstanding a reasonable fear of arrest.³ Nevertheless, we believe the Court has great discretion in this area, and is not bound by any of these decisions.

Mr. Guo does not have an issue with the deposition itself. Moreover, ZTE is willing to pay the full cost of conducting the deposition in Hong Kong or another location, including the cost of a special master to resolve any disputes on the spot. Accordingly, ZTE respectfully requests the Court to modify the Order to permit the deposition of Mr. Guo in Hong Kong, or another location mutually agreed by the parties, with ZTE paying all reasonable travel expenses and other costs associated with conducting the deposition abroad.

If the Court declines to modify the Order, this motion should serve as notice that ZTE is unable to comply with the Order and, regrettably, the time would be ripe for the Court to consider what sanction should be imposed for such noncompliance.

² See *Estate of Gerasimenko v. Cape Wind Trading Co.*, 272 F.R.D. 385, 387 (S.D.N.Y. 2011) (collecting cases); *Abdullah v. Sheridan Square Press, Inc.*, 154 F.R.D. 591, 592-93 (S.D.N.Y. 1994) (plaintiff's deposition to take place in London where indigent plaintiff had limited forum choice and travelling to the U.S. would jeopardize his U.K. asylum application).

³ See *Doe v. Karadzic*, Nos. 93 Civ. 878, 93 Civ. 1163, 1997 WL 45515, at *5 (S.D.N.Y. Feb. 4, 1997). But see *Farquhar v. Sheldon*, 116 F.R.D. 70, 73 & n.5 (E.D. Mich. 1987) (ordering defendant's deposition to take place in the Netherlands where defendant was concerned about arrest in U.S.).

Dated: New York, NY
August 5, 2015

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